89-545



No._____

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

LAWRENCE E. BOWLING,
Petitioner

v.

DAVID G. BRONNER, etc., et al.,
Respondents

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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53 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether *Mullane v. Central Hanover Trust Co.* and *Mennonite Board of Missions. v. Adams* are applicable to fiduciary officials of the Alabama Teachers' Retirement System who denied petitioner's Fourteenth Amendment rights by failing to give him clear and timely notice of a change in the retirement law entitling him to retire at age 60 with full retirement pension and by then denying him four years of his pension payments for failing to apply for them as soon as he could have, if respondents had kept him informed of his rights.

2. Whether fiduciary officials of the Alabama Teachers' Retirement System, directly or indirectly, violated discharged professor's First Amendment rights by withholding four years of his retirement pension payments which he would have received if he had relinquished his right to petition the courts for reinstatement and had applied for his pension immediately upon being discharged. *Speiser v. Randall*; *Braunfeld v. Brown*; *Sherbert v. Verner*; *Thomas v. Review Board.*[1]

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[1] Parties to the proceeding in the district court and in the court of appeals were plaintiff-petitioner Lawrence E. Bowling and defendants-respondents David G. Bronner, William C. Walsh, Donald C. Yancey, Jan E. Orgeron, William T. Stephens, Paul R. Hubbert, Wayne Teague, Annie Laurie Gunter, Sid McDonald, Vernon St. John, Dallas Ray Campbell, Ann Harris, Shirley Cochrane, Catherine Whitehead, Oscar Zeanah, and John Landers. See Appendix p. 1.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Lawrence E. Bowling respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on March 8, 1989.

## OPINIONS BELOW

The opinion of the court of appeals is appended hereto at Appendix 1. The order denying petition for rehearing en banc is at Appendix 8. The Judgment issued as mandate is at Appendix 9. The opinions of the district court are at Appendix 10 and 19.

## JURISDICTION

The opinion of the court of appeals was entered on March 8, 1989. A timely petition for rehearing en banc was denied on April 28, 1989. By Order dated July 18, 1989, this court extended the time for the filing of this petition to September 25, 1989. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Constitution, Amendment XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Alabama, § 16-25-14(a)(1):

> Any member who withdraws from service upon or after attainment of age 60 may retire upon written application to the board of control setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired; provided, that any such member who became a member on or after October 1, 1963, shall have completed 10 or more years of creditable service.

Code of Alabama, § 16-25-19(a):

> The general administration and responsibility for the proper operation of the retirement system and for making effective the provisions of this chapter are hereby vested in a board of trustees which shall be known as the board of control . . . .

Code of Alabama, §16-25-19(h):

> Subject to the limitations of this chapter, the board of control shall from time to time establish rules and regulations for the administration of the funds created by this chapter and for the transaction of its business.

## STATEMENT OF THE CASE

Petitioner Lawrence E. Bowling is a retired professor from the University of Alabama. Respondents are administrative officials and members of the Board of Control of the Alabama Teachers' Retirement System.

Jurisdiction of the district court was invoked pursuant to the First and Fourteenth Amendments; 42 U.S.C. §§ 1983, 1985, 1986; 28 U.S.C. §§ 1343, 2201, and 2202. The Complaint and the Amendment to Complaint filed on February 11, 1983, charge that respondents violated petitioner's constitutional rights in three respects: (1) they denied petitioner's Fourteenth Amendment right of Due Process (a) by not supplying him a copy of the 1969 Handbook or otherwise informing him that Alabama teachers could retire at age 60 without penalty for early retirement, (b) by applying against him administrative policies and constructions never adopted by the Board of Control, never published, and never made known to petitioner, and (c) by denying him a hearing on their failure to give notice of the change in the law; (2) they denied petitioner's rights of Equal Protection by applying their construction of the law unequally to him and other teachers; and (3) they violated his First Amendment rights by denying him four years of his retirement pension payments because he exercised his right to petition the courts for reinstatement instead of relinquishing that right and applying immediately for retirement. Record on Appeal R1-1-1, R2-50-1; Record Excerpts (hereinafter RE) 1, 22.

In an Order entered on April 22, 1987, the district court held respondents entitled to Eleventh Amendment immunity, dismissed all claims against them in their official capacities, and ordered parties to proceed with discovery. Appendix 10. They refused to give discovery, and the Court then granted their motion for summary judgment in their individual capacities, without allowing petitioner any discovery,

on the grounds: (i) that respondents' failure to notify petitioner of the change in the Retirement Law "does not rise to a constitutional violation"; (ii) that "Bowling has failed to offer any evidence of intentional "unjustifiable, group-based discrimination"; and (iii) that "this court does not believe that, if Bowling had sought retirement benefits in the wake of his discharge from the University of Alabama, his reinstatement lawsuit would have been necessarily mooted", and that his First Amendment claim is "an after-the-fact fabrication by him." Appendix 19 (Emphases added).

A panel of the Eleventh Circuit affirmed on other grounds, holding: (1) that no action by respondents had any chilling effect on petitioner's First Amendment rights; (2) that respondents did not "purposefully" discriminate against petitioner; and (3) that respondents had no obligation to notify petitioner of the change in the law affecting his retirement rights. Appendix 1. Suggestion for rehearing en banc was denied. Appendix 8. The Judgment was issued as mandate on May 8, 1989. Appendix 9.

## STATEMENT OF THE FACTS

Prior to 1969, Alabama Teacher Retirement Law required that formula plan annuities be reduced by 3 per cent for each year of retirement earlier than age 65. This reduction was eliminated by Act No. 26 of the 1969 Session of the Alabama Legislature. R3-105-Walsh Affid., p. 3. But respondents did not notify petitioner of this change in the law. RE 22. Although the change was explained in the *TRS Handbook*, 1969, respondents did not supply petitioner a copy of this edition of the handbook RE 8, R3-108-Affid. Lawrence E. Bowling, pp. 11-12, ¶¶ 6 and 7.

In August, 1972, petitioner was discharged from his tenured professorship in the University of Alabama. The district court found that the proceedings had

denied due process and ordered reinstatement of salary pending a second administrative hearing.

Following a second administrative hearing, petitioner was notified on April 2, 1976, that his appointment was being terminated as of May 16, 1976. He again appealed to the courts to determine whether the discharge was constitutional. At that time, petitioner was 60 years old, had more than ten years of creditable service in the Alabama Teachers' Retirement System, and was entitled under the new law to retire without reduction in pension. But respondents had never informed him of this right despite the fact that their records showed that he was no longer employed and that he was entitled to retire without reduction. They admit they knew that he and 58 other teachers were not receiving pensions to which they were entitled and that they failed to inform them of their rights. R1-1-1, ¶30; RE 7, ¶30.

Because respondents had not notified him of the change in the law, petitioner did not know that he had a choice between petitioning the courts for reinstatement and retiring with full pension. The only alternatives of which he was aware were: (1) petitioning the courts for reinstatement; (2) retiring immediately with a 15% reduction in pension payments, and (3) waiting till age 65 and then retiring with full pension. With these alternatives, he had nothing to lose and all to gain by petitioning the courts for reinstatement. R1-1-1, R2-50-1;RE 1, 22.

In late 1979, the courts finally decided the reinstatement issue adversely to petitioner. On December 19, 1979, he posted to the Teachers' Retirement System an urgent request for information "at your earliest convenience" concerning the most advantageous time for him to apply for retirement. Although the Retirement System office was closed only for Christmas day and New Year's day, and respondents could have notified him immediately by telephone or by letter, they delayed until January 8, 1980, and then posted him a letter back-dated to

January 2, advising (1) that he had become eligible to retire with full pension when he turned 60, on April 2, 1976, and (2) that the earliest he could now begin receiving retirement payments would be March 1, 1980. This was the first notice which TRS officials had ever given petitioner that he had become eligible for full retirement at age 60. Thus, he had lost almost four years of pension payments because they had failed to give him timely notice of his right to retire at age 60 without penalty, and they had caused him to lose an additional month of retirement income because of their negligent delay in answering his urgent request. R1-1-1; RE 1.

After encountering much stubborn resistance on the part of respondents, petitioner finally discovered the existence of a manual entitled *Policies of the Board of Control*, which respondents had deliberately concealed from him. This manual revealed that respondents had been applying against petitioner certain administrative policies and constructions which had never been adopted by the Board of Control (as required by Alabama Code § 16-25-19(h)), had never been published, and had never been made known to petitioner. Defendants Walsh, Yancey, and Stephens denied that respondents had any obligation or duty to advise teachers of their right to retire at age 60 with full benefits. Petitioner also discovered that respondents had been concealing from him the right of appeal to the Board of Control. After much further resistance, he finally obtained a hearing before the Board on December 12, 1980. R1-1-1; RE 1.

At the hearing, petitioner argued the First Amendment issue that denying him the four years of pension payments which he could have received by applying for them immediately, instead of petitioning the courts for reinstatement, had the indirect effect of penalizing him for exercising his right to petition the courts. Walsh and Stephens opposed his request, on the ground he should have applied for retirement in 1976, while continuing his court proceedings for reinstatement. Petitioner pointed out that application

for retirement would have mooted his court action. He cited the case of a discharged firemen who applied for retirement while petitioning the courts, which held that he had been unconstitutionally discharged but that he had relinquished his right to reinstatement by applying for retirement. *Appeal of Moore*, 493 P.2d 1091 (1972). The Board ignored that case and denied petitioner's request for the four years of petitioner's pension. R1-1-1; RE 1.

On June 26, 1981, petitioner appeared before the Board and requested permission to present argument that respondents failure to notify him of his right to retire without penalty at age 60 denied his Fourteenth Amendment rights of Due Process. This issue had never been considered by the Board. Respondent Paul R. Hubbert, Chairman of the Board, denied the request; and petitioner was never allowed the requested hearing. RE 39, R1-108-Affidavit, pp. 13-14.

## REASONS FOR GRANTING THE WRIT

The writ of certiorari should issue because:

1. The appellate panel misconceived the facts of the case and erroneously concluded that petitioner's constitutional claims were based on the doctrine of "chilling effect", which he had never pleaded.

2. On the First Amendment issue of the right to petition the courts, the appellate opinion is in conflict with prior decisions of the Supreme Court that a state may neither force a person to choose between two rights nor penalize him for exercising a First Amendment right. *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct.1332 (1958); *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144 (1961); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963); *Thomas v. Review Board*, 450 U. S. 709, 101 S.Ct 1425 (1981).

3. On the Fourteenth Amendment issue of Due Process, the panel opinion is in conflict with prior

decisions of the Supreme Court that a person may not be deprived of property without clear and timely notice and an opportunity for a hearing. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950); *Mennonite Board of Missions. v. Adams*, 462 U.S. 803, 103 S.Ct. 2706 (1983).

4. If the panel's opinion is allowed to stand, any school system can force any teacher to retire at age 60 by giving him the ultimatum: Retire and begin receiving your retirement pension immediately, or be fired and lose all your pension payments while challenging the discharge in court.

## THE RIGHT TO PETITION

The First Amendment provides in part: "Congress shall make no law . . . abridging the right . . . to petition the Government for a redress of grievances."

"Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition." *Cal. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 612 (1972) and citations.

A state "may not impose conditions which require the relinquishment of constitutional rights." *Frost Trucking Co. v. Railroad Com. of Cal.*, 271 U.S. 583, 594, 46 S.Ct. 605 (1926).

In *Speiser v. Randall*, the Court held that a state may not impose upon a benefit any condition which would deter or discourage the exercise of a First Amendment right, for the imposition of such a condition would tend indirectly "to produce a result which the State could not command directly." 357 U.S. 513, 526, 78 S.Ct. 1332. 1342. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." 357 U.S. at 518, 78 S.Ct. at 1338 (1958). This is precisely the contention consistently made by petitioner in the instant case: That denying to him four years of his

pension payments, which he could have received only by relinquishing his right to petition the courts, is to penalize him for exercising his First Amendment right to petition.

In *Sherbvert v. Verner*, the Court held that a state may not force a person to choose between two rights. 374 U.S. 398, 83 S.Ct. 1790 (1963). This law was pointed out to respondent David Bronner by University of Alabama's Civil Rights and Labor Law Professor Jay W. Murphy in a letter dated February 13, 1980. R1-1-1, Ex. A, Brief for Retiree, **Before the Board of Control**, p. A19. Two pages from *Sherbert* are included in said brief at A20-21.

It was after being fully apprized of this law that respondents denied petitioner's right to four years of his pension payments because he did not abandon his court action for reinstatement and apply for retirement immediately upon becoming eligible on April 2, 1976. Therefore, it was error for the appellate panel to conclude that respondents did not know of petitioner's court action at the time they denied his right to four years of his retirement payments.

The appellate panel completely misconceived petitioner's First Amendment issue as a claim for "chilling effect". The panel found:

> Bowling's allegations and claims for relief under § 1983 . . . are essentially as follows:
>
> 4. that his First Amendment right to petition the courts for redress of grievances was chilled because he was forced to choose between pursuing his court action challenging his termination and retiring with benefits when he first became eligible to do so. [Appendix 1, emphasis added]

Having made the fundamental error of misconceiving petitioner's First Amendment issue as a claim of "chilling effect", the panel then found that the facts do not support that presumed doctrine:

> We easily dispose of Bowling's First Amendment claim, because he does not allege, and the record contains no evidence, that any action by any of the appellees caused, proximately or otherwise, the chilling of his First Amendment right to challenge the constitutionality of his termination. . . . Nothing in the record in this case indicates that the appellees knew of Bowling's litigation when he became eligible to retire in 1976, or that Bowling knew then that he could retire at age 60 without being required to accept a reduction in benefits. Hence it is factually impossible for any of the appellees' actions or inactions to have caused Bowling's alleged First Amendment injury. [A. 5]

But "Bowling's alleged First Amendment injury" was not, and is not, a claim of "chilling effect".

Petitioner has never alleged that respondents ever performed any act which has ever had any "chilling effect" upon him. Petitioner has never alleged that they ever interfered in any way with his First Amendment right at any time before or during his court action for reinstatement. Their violation of his right to petition did not begin until he applied for his retirement pension and informed them that he had been pursuing his court action for reinstatement and could not apply sooner without mooting his court action. It was then that they first informed him that he had become eligible for retirement without pension reduction when he turned 60 on April 2, 1976, and that he should have applied for his pension at that time, even though he was then petitioning the courts. It was at that time that they contended that he should have chosen between his two rights; it was at that time that they penalized him for not having made what they considered the right choice. Their penalizing him for exercising his First Amendment right took place after they knew of his litigation and after Professor Murphy and he and his attorney had fully briefed respondents on this issue. R1-1-1, Ex. A, Brief for Retiree 5-8, A18-21.

Therefore, it was erroneous for the appellate panel to conclude that respondents did not know of Bowling's lawsuit at the time they penalized him for exercising his First Amendment right.

On the First Amendment issue, petitioner has consistently made the following allegations and arguments:

1. First, he has alleged the undisputed fact that, at the time he attained age 60 and became eligible to apply for retirement, he did not do so because he was engaged in court proceedings for reinstatement, and application for retirement would have mooted his court action. He cited to the Board of Control, to the district court, and to the court of appeals the Oklahoma Supreme Court decision in *Appeal of Moore*, 493 P.2d 1091 (1972). That case is directly on point. Moore was discharged from his position and applied for retirement while appealing to the courts. The courts held that Moore's discharge was unconstitutional, but that, "When Moore retired, he terminated service in the Department and waived any right to reinstatement." Id. at 1094. Plaintiff's Br. before the Eleventh Cir., pp. 3, 30.

2. Second, petitioner alleged before the Board of Control, in the district court, and in the court of appeals that respondents' denial of his four years of retirement benefits because he petitioned the courts for reinstatement had the indirect effect of penalizing him for exercising his First Amendment right to petition for redress of grievances. He cited *Frost Trucking Co. v. Railroad Com. of Cal.*, 271 U.S. 583, 594, 46 S.Ct. 605 (1926); *Speiser v. Randall*, 357 U.S. 513, 518, 526, 78 S.Ct.1332, 1338, 1342 (1958); *Braunfeld v. Brown*, 366 U.S. 599, 607, 81 S.Ct. 1144, 1148 (1961); *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790 (1963); *Thomas v. Review Board*, 450 U. S. 709, 716, 101 S.Ct 1425, 1431 (1981).R1-1-1, Ex. A, p. 5-7; R3-108-2; Appellant's Br. in the Eleventh Circuit 26-27.

## RIGHT OF EQUAL PROTECTION

> The Fourteenth Amendment provides in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The appellate panel made the same error in their ruling on the Fourteenth Amendment issues that they made in ruling on the First Amendment issue. The panel concluded:

> For a similar reason, we find no merit to Bowling's equal protection claim. As we have stated, Bowling does not allege that the appellees knew anything of his litigation in 1976, nor does he allege that he informed them of his desire to retire. Hence it would have been impossible for the appellees to have applied Alabama's teachers' retirement scheme in such a way as to purposefully discriminate against Bowling because he was challenging through litigation the constitutionality of his termination. [Appendix 6]

Petitioner has never at any time alleged that respondents ever applied the law unequally to him prior to their knowledge of his court action. His equal protection claim relates only to respondents' discriminations after he applied for retirement and after they knew of his court action.

Actually, petitioner's Complaint ¶¶ 47(a) and 47(b) state two separate claims of unequal application of the law. The first is related to petitioner's First Amendment claim. Respondents' denying petitioner's four years of benefits because he petitioned the courts instead of applying immediately for retirement has the effect of dividing discharged teachers into two groups and treating differently (1) those who exercise their First Amendment Right to petition the courts for reinstatement and (2) those who abandon that

constitutional right and apply immediately for retirement benefits.

Petitioner's second charge of discrimination is that respondents do not apply equally to all teachers their own individual and subjective construction of Alabama Code § 16-25-14(a)(1). He repeatedly sought discovery to prove this point. R3-108-7ff; R1-13-3, ¶ 24; R1-14-2, ¶ 13; R1-15-3, ¶¶ 24-25; R1-16-3, ¶¶ 24-25; R2-61-1; R2-65-2, ¶¶ 15-19. . But the district court denied petitioner's motions for discovery (R2-71-1; R3-94-1) and granted summary judgment in favor of defendants without allowing petitioner any discovery. Appendix 10, 19.

## DUE PROCESS RIGHT TO CLEAR AND TIMELY NOTICE AND HEARING

The Fourteenth Amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

This court has held that a person may not be deprived of property without clear and timely notice and the opportunity for a hearing. Fourteenth Amendment; *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950); *Mennonite Board of Missions. v. Adams*, 462 U.S. 803, 103 S.Ct. 2706 (1983).

In *Mullane*, the Court held that "impersonal broadcast notification" by trustees does not satisfy the requirement of due process for beneficiaries with "substantial property rights" and with known names and addresses. 339 U.S. at 320, 70 S.Ct. at 660. For such beneficiaries, trustees must give notice which is clear, timely, and personal:

> Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

> The trustee has on its books the names and addresses of the income beneficiaries represented by the appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses. . . . Certainly sending them a copy of the statute months and perhaps years in advance does not answer this purpose. [339 U.S. at 318, 70 S.Ct. at 659.

In *Mennonite Board of Missions v. Adams*, the Court held that a county's use of general notice by publication does not meet the requirements of due process when "an inexpensive and efficient mechanism such as mail service is available." 462 U.S. at 799, 103 S.Ct. at 2712. "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." 462 U.S. at 800, 103 S.Ct. at 2712 (Court's emphasis).

The Alabama Supreme Court has reprimanded these respondents for their unsympathetic and adversary attitude toward their beneficiaries. In an action against these same officials, the Court held (a) that they are "trustees" of "trust funds", (b) that they have a fiduciary duty to their membership, (c) that they may not assume "an arms length" posture in dealing with their membership, (d) that they must make a special effort to keep their members properly advised of their retirement rights, and (e) that they must assist members in applying for and receiving the maximum benefits provided by law. *Employees Retirement System v. McKinnon* [actually against the Teachers' Retirement System], 349 So.2d 569, 573-574 (Ala. 1977).

Prior to 1969, Alabama Teacher Retirement Law required that formula plan annuities be reduced by 3 per cent for each year of retirement earlier than age

65. This reduction was eliminated by Act No. 26 of the 1969 Session of the Alabama Legislature. R3-105-Walsh Affid., p. 3. But respondents did not notify petitioner of this change in the law. RE 22. Although the change was explained in the *TRS Handbook*, 1969, respondents did not supply petitioner a copy of this edition of the handbook RE 8, R3-108-Affid. Lawrence E. Bowling, pp. 11-12, ¶¶ 6 and 7.

On April 2, 1976, petitioner was notified that his professorship in the University of Alabama was being terminated as of May 16, 1976. At that time, petitioner was 60 years old, had more than ten years of creditable service in the Alabama Teachers' Retirement System, and was entitled under the new law to retire without reduction in pension. But respondents had never informed him of this right despite the fact that their records showed that he was no longer employed and that he was entitled to retire without reduction. They admit they knew that he and 58 other teachers were not receiving pensions to which they were entitled and that they failed to inform them of their rights. R1-1-1, ¶30; RE 7, ¶30.

If respondents had performed their fiduciary duty, as trustees and fiduciaries, to keep petitioner clearly and timely informed of his right to retire in 1976 without pension reduction, as mandated by this court in *Mullane v. Central Hanover Trust Co.* and more recently by the Alabama Supreme Court in *Employees' Retirement System v. McKinnon*, petitioner would have been in position to make a knowledgeable and informed decision concerning whether to petition the courts for reinstatement or to retire at that time and immediately begin receiving his retirement pension.

But, because respondents had not notified him of the change in the law, petitioner did not know that he had a choice between petitioning the courts for reinstatement and retiring with full pension. The only alternatives of which he was aware were: (1) petitioning the courts for reinstatement; (2) retiring immediately with a 15% reduction in pension

payments, and (3) waiting till age 65 and then retiring with full pension. With these alternatives, he had nothing to lose and all to gain by petitioning the courts for reinstatement. R1-1-1, R2-50-1;RE 1, 22.

In late 1979, the courts finally decided the reinstatement issue adversely to petitioner. On December 19, 1979, he posted to the Teachers' Retirement System an urgent request for information "at your earliest convenience" concerning the most advantageous time for him to apply for retirement. The Retirement System office was closed only for Christmas day and New Year's day, and respondents could have notified him immediately by telephone or by letter.

Instead, respondents delayed their response until January 8, 1980, and then posted him a letter back-dated to January 2, advising (1) that he had become eligible to retire with full pension when he turned 60, on April 2, 1976, and (2) that the earliest he could now begin receiving retirement payments would be March 1, 1980. This was the first notice which TRS officials had ever given petitioner that he had become eligible for full retirement at age 60. Thus, he had lost almost four years of pension payments because they had failed to give him timely notice of his right to retire at age 60 without penalty. They had caused him to lose an additional month of retirement income because of their negligent delay in answering his urgent request. R1-1-1; RE 1.

After encountering much stubborn resistance on the part of respondents, petitioner finally discovered the existence of a manual entitled *Policies of the Board of Control*, which respondents had deliberately concealed from him. This manual revealed that respondents had been applying against petitioner certain administrative policies and constructions which had never been adopted by the Board of Control (as required by Alabama Code § 16-25-19(h)), had never been published, and had never been made known to petitioner. Defendants Walsh, Yancey, and

Stephens denied that respondents had any obligation or duty to advise teachers of their right to retire at age 60 with full benefits. Petitioner also discovered that respondents had been concealing from him the right of appeal to the Board of Control. After much further resistance, he finally obtained a hearing before the Board on December 12, 1980. R1-1-1; RE 1.

At the hearing on December 12, 1980, petitioner argued the First Amendment issue. But he did not argue the Fourteenth Amendment issue. On June 26, 1981, petitioner appeared before the Board and requested permission to present argument that respondents' failure to notify him of his right to retire without penalty at age 60 denied his Fourteenth Amendment rights of Due Process. Respondent Paul R. Hubbert, Chairman of the Board, denied the request; and petitioner was never allowed the requested hearing. RE 39, R1-108-Affidavit, pp. 13-14.

On this issue, the appellate panel held:

> Bowling's first due process claim is that the TRS should have notified him individually of the legislative change in 1969 which resulted in his eligibility to retire at age 60 without having to accept a reduction in benefits. This proposition is untenable. Bowling has cited no case, and our research has not discovered one, which maintains the due process right of individual citizens to be individually notified of legislative enactments which might potentially effect [sic] the citizen's economic interests. [Appendix 6]

This finding completely misconceives the issue. Petitioner is not bringing this action as a mere "citizen" of the state, and he has never "maintained the due process right of individual citizens to be individually notified of legislative enactments which might potentially effect [sic] the citizen's economic interests." Petitioner is a "beneficiary" of the Teachers' Retirement System. He has performed

specific services entitling him to the right to be kept informed of his retirement rights by the "trustees" of his "trust funds". And respondents are the "trustees" whose duty is to keep him informed of those rights. Respondents stand in the same fiduciary relationship to petitioner that a doctor stands in relationship to a patient or a lawyer to a client. The appellate panel has built up, and then knocked down, a "straw man" which has no resemblance to the case at bar.

The panel concludes:

> Bowling essentially claims that eligible retirees should not have to apply for benefits, and that it should be the duty of the TRS to determine whether all potential retirees are eligible to retire and, in fact, desire to do so. [Appendix 7]

On the contrary, petitioner has never made, and does not now make, any such claim. He demands no more process than has been mandated by this court in *Mullane* and *Mennonite, supra*, and by the Alabama Supreme Court in *McKinnon, supra.*

In *McKinnon*, both the district court and the Alabama Supreme Court held that teacher retirement laws "shall be liberally construed with a view of promoting the object for which they were adopted." 349 So.2d at 571, quoting the district court. The Alabama Supreme Court concluded:

> The legislature refers to the Board of Control as "Trustees" and to the funds they administer as "trust funds." The legislative intent obviously is such that members are not expected to deal at arms length with the Board of Control. In fact, the converse would be more apt. The obligation is upon the Board of Control to adopt procedures which will aid members in making a knowledgeable and informed election . . . so that the members will receive all benefits provided by law. [Id. 349 So.2d at 573-574]

## CONCLUSION

This petition presents the Court with the opportunity to define the parameters of the First and Fourteenth Amendments and of the herein referenced decisions as they apply to the constitutional rights of teachers.

Requiring the Alabama Teachers' Retirement System to observe the Fourteenth Amendment right of Due Process by giving clear, timely, and personal notice to all members who are eligible for retirement but not receiving pensions will place no undue burden upon the System, which has their addresses readily available. In 1980, respondents admitted they knew of 59 such persons. This is not a large number to notify by letter. R1-1-1, p. 8, ¶30; RE 8, ¶ 30. In the alternative, retirement officials should be required at least to supply every member with a copy of the most recent law, rules, regulations, and procedures.

Requiring the Alabama Teachers' Retirement System to observe the First Amendment rights of teachers to petition the courts, and restraining them from penalizing teachers for exercising their constitutional rights will place even less burden upon the System, for there are very few such cases of litigation. But such ruling will protect the teachers' First Amendment rights, protect their job security after age 60, and prevent school systems from intimidating, or forcing the resignations of, teachers by threats.

For the reasons stated in this petition, the writ should issue.

Dated this 19th day of September, 1989.

Respectfully submitted,

Lawrence E. Bowling

Lawrence E. Bowling, Petitioner Pro Se
P. O. Box 121
Berea, KY 40403

## FILING AND MAILING CERTIFICATE

I, Lawrence E. Bowling, Petitioner Pro Se, hereby certify that on this 19th day of September, 1989, I filed with the Clerk of the Supreme Court of the United States the foregoing Petition for Writ of Certiorari and the Appendix, and I further certify that on this same date I posted three copies of the Petition and the Appendix by prepaid U.S. Mail to W. T. Stephens, 135 South Union Street, Montgomery, AL 36130.

Lawrence E. Bowling

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NO. 88-7146

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D. C. Docket No. 81-634

LAWRENCE E. BOWLING, Plaintiff-Appellant

versus

DAVID G. BRONNER, individually and as Secretary-Treasurer, Teachers' Retirement System; WILLIAM C. WALSH, individually and as Acting Secretary-Treasurer, TRS; WILLIAM T. STEPHENS, individually and as Counsel, TRS; DONALD L. YANCEY, individually and as Retirement Executive, TRS; JAN E. ORGERON, individually and as Statistician, TRS; PAUL R. HUBBERT, individually and as Member, Board of Control, Teachers' Retirement System; WAYNE TEAGUE, individually and as Member, Board of Control, TRS; ANNIE LAURIE GUNTER, individually and as Member, Board of Control, TRS; SID MCDONALD, individually and as Member, Board of Control, TRS; SHIRLEY COCHRANE, individually and as Member, Board of Control, TRS; ANN HARRIS, individually and as Member, Board of Control, TRS; DALLAS RAY CAMPBELL, individually and as Member, Board of Control, TRS; VERNON ST. JOHN, individually and as Member, Board of Control, TRS; CATHERINE WHITEHEAD, individually and as Member, Board of Control, TRS;OSCAR ZEANAH, individually and as Member, Board of Control, TRS; JOHN LANDERS, individually and as Member, Board of Control, TRS,

Defendants-Appellees.

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Appeal from the United States District Court
for the Middle District of Alabama

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(March 8, 1989)

Before RONEY, Chief Judge, COX, Circuit Judge and MORGAN, Senior Circuit Judge.

PER CURIAM:

Appellant Lawrence Bowling appeals orders of the district court the cumulative effect of which was to dismiss a variety of federal constitutional and pendent state law claims which Bowling asserted against officials of the Alabama Teachers' Retirement System ("TRS") and members of its Board of Control in their official and individual capacities.[1] We affirm.

I. BACKGROUND.

The salient facts are essentially undisputed. Bowling was a tenured English professor at the University of Alabama when formal dismissal charges were filed against him in April, 1972. Following a faculty committee hearing, it was determined that his employment would be terminated effective August 13, 1973. In February, 1973, Bowling filed the first of several lawsuits challenging his termination. In the

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[1]Claims asserted under 42 U.S.C. §§ 1985(3) and 1986 (1981) were dismissed for failure to state claims upon which relief could be granted, and claims under 42 U.S.C. § 1983 (1981) asserted against the appellees in their official capacities were dismissed because of the bar of the Eleventh Amendment. The pendent state law claims were also dismissed. Subsequently, appellees' motion for summary judgment as to claims asserted against them in their individual capacities was granted on the basis of the district court's conclusions that the appellees were entitled to qualified immunity, and that the claims simply lacked merit. On this appeal, Bowling only challenges dismissal of his section 1983 claims against the appellees in their official and individual capacities. Consequently, he has abandoned his claims under sections 1985(3) and 1986, and his pendent state law claims. Roberts v. Wainwright, 666 F.2d 517, 518 (11th Cir.), cert. denied, 459 U.S. 878 (1982).

first of the federal lawsuits, the district court held that Bowling had been terminated without due process of law, and ordered him reinstated pending a committee hearing which complied with the requirements of due process. After a second faculty committee hearing was held, Bowling was terminated effective August 15, 1976. Bowling continued, unsuccessfully, to challenge his termination in federal court, his challenges ultimately being resolved adversely to him in late 1979.

Prior to 1969, teachers in Alabama who retired before their sixty-fifth birthday were required to take a reduction in retirement benefits. That requirement, however, was eliminated by Act No. 26 of the 1969 session of the Alabama Legislature, and teachers became eligible for full retirement benefits at age sixty. Bowling turned sixty on April 2, 1976, and became eligible to retire. He did not apply for retirement benefits at that time; instead, he awaited the completion of the litigation challenging his termination, and first sought information about available retirement benefits in late December, 1979. He was informed in early January, 1980, that he became eligible to retire in 1976, but that he could not recover benefits retroactively, and that he could not, under applicable law, receive his first benefit installment until March 1, 1980. In essence, Bowling's complaint in this case seeks to recover retirement benefits from April, 1976, to March 1980.

II. DISCUSSION

Bowling's allegations and claims for relief under section 1983, gleaned from a handful of original, amended, and supplemental pleadings, are essentially as follows:

1. that his rights under the Due Process Clause of the Fourteenth Amendment were violated in the following respects:

a. by the Board's failure to notify him individually of the 1969 change in the law which resulted in his becoming eligible to retire at age 60;

b. by the Board's narrow construction of applicable statutes and regulations concerning eligibility for retirement, calculation of creditable service, and the need for an application prior to receipt of benefits;

c. by the Board's denying him a hearing before on his due process challenges;

d. by the Board's failure to establish and adhere to published rules and regulations regarding determination of retirement eligibility and the method of calculating benefits; and

e. by the Board's reliance upon unpublished policies for the determination of retirement eligibility and the calculation of benefits;[2]

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[2]The last two of these claims are not briefed by Bowling on appeal, and are, therefore, abandoned. See Roberts v. Wainwright, supra n. 1.

[3]Section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia (emphasis supplied).

2. that his rights under the Equal Protection Clause of the fourteenth Amendment were violated because teachers are segregated according to whether they choose to retire or to challenge their terminations through litigation;

3. that the appellees conspired to violate his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and

4. that his first Amendment right to petition the courts for redress of grievances was chilled because he was forced to choose between pursuing his court action challenging his termination and retiring with benefits when he first became eligible to do so.

We easily dispose of Bowling's First Amendment claim, because he does not allege, and the record contains no evidence, that any action by any of the appellees caused, proximately or otherwise, that chilling of his first Amendment right to challenge the constitutionality of his termination. Section 1983 on its face requires proof of a causal connection between challenged conduct and alleged injury. Williams v. Bennett, 689 F.2d 1370, 1380 (11th Cir. 1982), cert. denied, 464 U.S. 932 (1983).[3] Nothing in the record in this case indicates that the appellees knew of Bowling's litigation when he became eligible to retire in 1976, or that Bowling knew then that he could retire at age 60 without being required to accept a reduction in benefits.[4] Hence, it is factually impossible for any of the appellees' actions or inactions to have caused Bowling's alleged First Amendment injury. For this reason, we conclude that

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[4]Bowling's alleged lack of knowledge of his eligibility to retire at age 60 is, of course, one of his due process claims, which we treat later in the opinion.

the district court correctly found no merit to the First Amendment portion of Bowling's section 1983 claims.[5]

For a similar reason, we find no merit to Bowling's equal protection claim. As we have stated, Bowling does not allege that the appellees knew anything of his litigation in 1976, nor does he allege that he informed them of his desire to retire. Hence, it would have been impossible for the appellees to have applied Alabama's teachers' retirement scheme in such a way as to purposefully[6] discriminate against Bowling because he was challenging through litigation the constitutionality of his termination.

Bowling's first due process claim is that the TRS should have notified him individually of the legislative change in 1969 which resulted in his eligibility to retire at age 60 without having to accept a reduction in benefits. This proposition is untenable. Bowling has cited no case, and our research has not discovered one, which maintains the due process right of individual citizens to be individually notified of legislative enactments which might potentially effect the citizen's economic interests. Such a rule would be ridiculously burdensome on the entity charged with dispensing such notice, whether it be the legislature itself or an administrative agency charged with administering the particular enactment. Pretermitting the question whether it is a fundamental right of a public employee to retire under a state-created retirement scheme as soon as

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[5]The district court did not reason to this result as we do, but it is axiomatic that we can affirm the result reached by the district court even if that result is reached for the wrong reason. Securities and Exchange Commission v. Chenery Corp., 318 U. S.80, 88 (1943).

[6]The Fourteenth Amendment, of course, prohibits only intentional discrimination. E & T Realty v. Strickland, 830 F.2d 1107, 1114 (11th Cir. 1987).

that employee is eligible to do so, see generally Karr v. Schmidt, 460 F.2d 609 (5th Cir.), cert. denied, 409 U.S. 989 (1972), it would be patently unreasonable to place upon the state the burden of individually notifying potential retirees of legislative changes in their retirement eligibility. We reject, therefore, the first of Bowling's due process claims.

Bowling's due process claim that the TRS has too narrowly construed relevant statutes in determining that he cannot retroactively recover retirement benefits for which he did not apply is spurious. Bowling essentially claims that eligible retirees should not have to apply for benefits, and that it should be the duty of the TRS to determine whether all potential retirees are eligible to retire and, in fact, desire to do so. Again, assuming Bowling's retirement decision is entitled to due process protection, any such retirement would be absurdly burdensome upon the TRS, and we reject Bowling's argument for this reason.

Finally, we reject Bowling's due process claim that he did not have an opportunity to be heard before the Board on his due process claim. On the contrary, the record amply demonstrates that Bowling received all the process he was due under applicable state law and the Constitution.[7]

III. CONCLUSION

For the reasons given in this opinion, the judgment of the district court is AFFIRMED.

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[7]Because we reject both Bowling's equal protection and his due process claims, we also reject his claims that the appellees conspired to violate his equal protection and due process rights.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NO. 88-7146

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D. C. Docket No. 81-634

LAWRENCE E. BOWLING,
Plaintiff-Appellant
versus

DAVID G. BRONNER et al.,

Defendants-Appellees

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Appeal from the United States District Court
for the Middle District of Alabama

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ON PETITION FOR REHEARING AND
SUGGESTION OF REHEARING IN BANC
(Opinion March 8, 11 Cir., 1989)
(Apr. 28, 1989)

Before RONEY, Chief Judge, COX, Circuit Judge and MORGAN, Senior Circuit Judge.

The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, the Suggestion(s) for Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

s/Ernest R. Cox

United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NO. 88-7146

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D. C. Docket No. 81-634

LAWRENCE E. BOWLING, Plaintiff-Appellant

versus

DAVID G. BRONNER et al., Defendants-Appellees

---

Appeal from the United States District Court
for the Middle District of Alabama

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Before RONEY, Chief Judge, COX, Circuit Judge and MORGAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by Counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: March 8, 1989
For the Court: Miguel J. Cortez, Clerk
By: Karleen McNabb
Deputy Clerk
ISSUED AS MANDATE: MAY 8, 1989

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

LAWRENCE E. BOWLING, Plaintiff

v.

DAVID G. BRONNER, etc., et al., Defendants

CA-81-634-N

ORDER

Plaintiff Lawrence E. Bowling, a retired state university professor, has brought this lawsuit against various officials of the Alabama Teachers' Retirement System; he charges, among other things, that these defendant officials denied him a part of his retirement benefits in violation of federal and state law. This lawsuit is now before the court on these officials' motion to dismiss. For reasons that follow, the motion is due to be granted in part and denied in part.

I.

The undisputed facts in this case are as follows: On April 2, 1976, Bowling reached the age of 60. At that time he was engaged in federal litigation challenging his termination as a professor at the University of Alabama. In 1979, he lost his legal challenge and retired. On December 19, 1979, he wrote the Alabama Teachers' Retirement System and requested information regarding his retirement benefits. By letter dated January 2, 1980, System officials informed him that, among other things, although he became eligible for retirement when he turned 60 in 1976 he could not receive benefits retroactively and further that he would not receive his first periodic benefit payment until March 1980. By this lawsuit, Bowling now seeks, in so many words, recovery of retirement benefits from sometime in 1976 to March 1, 1980, and compensatory and punitive damages. His primary contentions are that the defendants' failure to notify

him in 1976 of his right to retirement benefits violated his federal right to due process; that the defendants waited too long in responding to his December 19, letter requesting information about his retirement benefits and, as a result, he was denied one month's benefits; and that applicable state law violates the federal rights of teachers, situated similarly to him, to equal protection of the law.

In addition, after the filing of this lawsuit, one of the defendant officials filed a brief which Bowling claims was libelous. Bowling has now amended his complaint to seek damages for this alleged libel.

Bowling premises his claim for recovery on retirement benefits and related damages on 42 U.S.C.A. §§ 1983, 1985(3), 1986, and various state law theories, and he premises his libel claim purely on state law.

II. Section 1985(3)

It is well established that § 1985(3) affords a remedy only if there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions."[1] Griffin v.

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1. Section 1985(3) provides that:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of laws, or of equal privileges and immunities under the law; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more person conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or

Brekenridge, 403 U.S. 8, 102, 91 S.Ct. 1790, 1798 (1971). See also Unites Brotherhood of Carpenters and Joiners of America v. Scott, 463 U.S. 825, 103 S.Ct. 3352 (1983). Bowling has not alleged any racially or otherwise class-based animus on the part of the state officials, and, accordingly, his complaint to the extent it rests on § 1985(3) is due to be dismissed.

III. Section 1986

Section 1986 creates causes of action only for failure to prevent wrongs prohibited in § 1985.[2] Thus,

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Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

2. Section 1986 provides that:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representative, for all damages caused by such wrongful act, which such person my reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action

whether an actionable claim is stated under § 1986 depends upon whether an actionable claim has been stated under § 1985. Since Bowling has failed to state a claim under § 1985(3)--the only part of § 1985 he relies upon--it follows that he has also failed to state a claim under § 1986. As a result, his complaint to the extent it rests on 1986 is due to be dismissed.

## IV. Section 1983

Under § 1983, Bowling is seeking retroactive retirement benefits and other damages from the defendant officials in their official and individual capacities.[3]

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therefor, and may recover not exceeding $5000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action accrued.

3. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The court is of the opinion that such relief against the defendants in their official capacities is barred by the eleventh amendment. This amendment bars suits by citizens against a state and its agencies and officials in federal courts, where such suits would impose a liability on the state treasury. Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974). The court is convinced that the Teachers' Retirement System of Alabama is in effect a state agency and the defendants are state officials, and that thus Bowling's lawsuit is in effect against the state and barred by the eleventh amendment.

There are many factors that lead the court to this conclusion. Most importantly, the System has the attributes of an arm of the state. The System is substantially and pervasively regulated by state law, 1975 Ala. Code §§ 16-25-1 to 16-25-28; state funds are used in substantial part to finance the program, § 16-25-21, state officials along with private individuals manage the System, § 16-25-19; the State Attorney General is the System's legal advisor, § 16-25-19(1); and the System's employees are under the state merit system along with all other state employees, § 16-25-19(i). Moreover, the System is principally for state public school teachers, § 16-25-1(3); its funds are exempt from taxation and attachment, §16-25-23; and it is expressly immune from suit under state law, § 16-25-2(b).

Finally, the Teachers' Retirement System is substantially tied, and almost identical, to the State Employees' Retirement System. Indeed, a teacher who becomes a state employee may easily transfer his or her benefits in the Teachers' Retirement System to the State Employees' Retirement System. It is therefore noteworthy that state courts have treated the State Employees' Retirement System as a state agency, see Brogden v. Employees' Retirement System,

336 So.2d 1376 (Ala. Civ. App.), cert. denied, 336 So.2d 1381 (Ala. 1976); and that they have further treated benefit challenges brought by state employees as "appeals" from a state agency, see Turner v. State Employees' Retirement System, 485 So.2d 765 (Ala. Civ. App. 1986). This court would therefore expect that state courts would treat the Teachers' Retirement System and benefit challenges brought by public teachers similarly.

Admittedly, the Teachers' Retirement System has "the power and privileges of a corporation," 1975 Ala. Code § 16-25-2-a), including the right to own property, § 16-25-22. And, to be sure, the system provides a service also offered by private entities--i.e., the System provides retirement and other similar employment benefits. The court is nevertheless convinced that, in the balance, the System is in effect a state agency entitled to eleventh amendment immunity. Bowling's § 1983 claims against the defendants in their official capacities are therefore due to be dismissed.

B.

The defendants admit that the eleventh amendment does not absolutely bar Bowling's § 1983 claims to the extent the claims are against them in their individual capacities. They argue, however, that they are entitled to common law "qualilfied immunity."

In Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982), the Supreme Court held that federal "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known;" Furthermore, this defense turns on "objective factors" and is resolvable by the coujrt at the outset of the lawsuit. Id., at 818-19, 102 S.Ct. at 2738-39. This immunity defense, as stated in Harlow, has been

extended to state officials. Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012 (1984).

Here, Bowling contends that, prior to his retirement, state officials told him that he had to wait until he reached 65 to obtain his retirement benefits, that he relied on this representation, and that state officials later changed their policy without informing him to his detriment. Bowling claims that the change without notice violated due process and § 1983. If Bowling can substantiate his claim, he may have stated a clearly established due process violation, about which any reasonable person would have known. The parties have not fully briefed this claim and the other claims of constitutional violations made by Bowling. The defendants are therefore not entitled to qualified immunity at this time.[4] They may, however, be entitled to such immunity, after discovery, on a motion for summary judgment.

V. State Law Claims

Bowling has stated a number of state law claims against the defendants. The court will first address all but his libel claim.

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4. In an earlier order, later vacated, the court found that the defendants were entitled to qualified immunity on Bowling's § 1983 claims. At that time Bowling contended, among other things, that the defendants were obligated by federal law, irrespective of any inquiry on the part of Bowling to inform Bowling of all rules and regulations by which the Teachers' Retirement System operates. The court was of the opinion that this claim as well as other claims asserted by Bowling were not "clearly established." Since that order, Bowling has amended his claims to include a contention that, prior to his retirement, the defendants expressly represented to him that he could not receive his retirement benefits until he turned 65, that he relied on this representation, and that the defendants later changed their policy without notifying him to his injury.

A.

This court is barred from considering Bowling's state claims. The eleventh amendment prohibits a federal court from exercising pendent jurisdiction over claims that state officials violate state law in carrying out their official responsibilities, Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900 (1984). Silver v. Baggiano, 04 F.2d 1211, 1213 ((11th Cir. 1986); and a claim that state officials erroneously exercised their responsibilities is not sufficient to pierce this shield of immunity. Silver, 804 F.2d at 1214. Bowling's state law claims are therefore due to be dismissed without prejudice.

B.

As stated, after this lawsuit was filed, Bowling amended his complaint to charge one of the defendants with libel, based upon certain statements made by the defendant to the court. Bowling's libel claim is based on state law.

This court is without pendent jurisdiction over Bowling's libel claim. Such jurisdiction extends only to federal and state claims that derive from a "common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138 (1960). The factual issues in the federal claims presented here center on the denial of retirement benefits to Bowling by certain state officials. Whether one of these officials later libeled Bowling is a completely separate and unrelated factual issue, over which this court has no jurisdiction. Bowling's libel claim is therefore due to be dismissed without prejudice.

Accordingly, it is ORDERED:

(1) That the defendants' motion to dismiss is granted to the extent:

(a) That the plaintiff's claims premised on 42 U.S.C.A. §§ 1985 and 1986 are dismissed in their entirety;

(b) That the plaintiff's claims premised on 42 U.S.C.A. § 1983 are dismissed to the extent the claims are against the defendants in their official capacities; and

(c) That the plaintiff's claims premised on state law, with the exception of his libel claim, are dismissed without prejudice in their entirety; and

(d) That the plaintiff's claim premised on state libel law is dismissed without prejudice in its entirety; and

(2) That the defendants' motion to dismiss is denied in all other respects.

It is further ORDERED that all other pending motions filed by the parties are denied.

It is further ORDERED that the parties are allowed to proceed with discovery on all remaining issues in this lawsuit.

It is further ORDERED that the plaintiff and the defendants are allowed 35 days from the date of this order to file motions for summary judgment on the remaining issues in this lawsuit.

DONE, this the 22nd day of April, 1987.

s/ Myron Thompson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

LAWRENCE E. BOWLING,
Plaintiff
v. CA No. 81-634-N

DAVID G. BRONNER, etc., et al.,
Defendants

MEMORANDUM DECISION

Plaintiff Lawrence E. Bowling, a retired state university professor, has brought this lawsuit against various officials of the Alabama Teachers' Retirement System; he charges, among other things, that these defendant officials denied him a part of his retirement benefits in violation of federal law. This lawsuit is now before the court on cross-motions for summary judgment. For reasons that follow, the defendants' motion is due to be granted and Bowling's motion is due to be denied.

I.

In its order of April 22, 1987, this court summarized the facts as follows. On April 2, 1976, Bowling reached the age of 60. At that time he was engaged in federal litigation challenging his termination as a professor at the University of Alabama. In 1979, he lost his legal challenge and retired. On December 19, 1979, he wrote the Alabama Teachers' Retirement System and requested information regarding his retirement benefits. By a letter date January 2, 1980, system officials informed him that, among other things, although he became eligible for retirement when he turned 60 in 1976 he could not receive benefits retroactively and further that he would not receive his first periodic benefit payment until March 1980. By this lawsuit, Bowling now seeks, in so many words, recovery of retirement benefits from sometime in 1976 to March 1, 1980, and, compensatory and punitive damages.

By the April order, the court dismissed Bowling's claims to the extent they rested on 42 U.S.C.A. § 1983, 1986; the court also dismissed additional state law claims he had asserted. The court also held that, as to his remaining claims under 42 U.S.C.A. § 1983, he could not sue the defendants in their official capacities because of the eleventh amendment.[1] Therefore, the remaining issue, left unresolved in the April 22 order and now presented by the parties' cross-motion for summary judgment, is whether the defendants in their individual capacities are entitled to 'qualified immunity' from suit under § 1983.

Bowling presents essentially three claims under § 1983. First, he claims that defendants failed to notify

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1. In an order prior to April 22, 1987, this court held the same thing, relying principally on a decision of the Alabama Supreme Court. While this case was on Appeal the Eleventh Circuit Court of Appeals, the Alabama Supreme Court vacated its decision, and the Eleventh Circuit in turn vacated this court's decision and remanded this case back to this court.

In its April 22 order, this court found, in substance, that the Teachers' Retirement System is a state agency and that its officials are thus entitled to eleventh amendment immunity. This court would now add that, if its conclusion is incorrect, then it is alternatively convinced that the Teachers' Retirement System officials did not act under 'color of state law' and thus Bowling has not established claims under §1983. Nail v. Community Action Agency of Calhoun County, 805 F.2d 1500 (11th Cir. 1986) (per curiam) Headstart Program that received significant state funds did not act under color of state law when it discharged teacher's aid).

To be sure, there is no necessary correlation between whether an entity is entitled to eleventh [sic] immunity and whether its conduct is under color of state law; for example, counties or cities are not entitled to eleventh immunity, but yet their officials act under color of state law. Here, however, the court is convinced that, if the Teachers' Retirement System is not an arm of state government, then it is private; it would not be an arm of local government.

him that he could have retired prior to reaching age 65 without suffering a benefit penalty. Second, he claims that the defendants treated him differently from other teachers, in violation of the equal protection clause of the fourteenth amendment. And third, he claims that the defendants infringed his right to petition government by denying him reinstatement benefits he would have received if he had not pursued his litigation to retain his job.

II.

Recently, in Anderson v. Creighton, ____ U.S. ____, 107 S.Ct. 3034 (1987), the United States Supreme Court wrote that a governmental official is entitled to qualified immunity unless the right the official is alleged to have violated has been "clearly established"; and, by clearly established, the Court emphasized that it meant not in a general or abstract way, but rather in a "particularized sense." Id., at ____, 107 S.Ct. at 3039. The Court explained that,

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Id. (Citations omitted).

In explaining its requirement of particularization, the Court used an example directly applicable to one of Bowling's claims, his due process claim. The Court explained that "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that clause (no matter how unclear it may be that the particular action is violated) violated a clearly established right." Id., at ____, 107, S.Ct. at 3039.

Here, the court is convinced that Bowling has not only failed to establish with sufficient particularity that his claims were clearly established, he has failed to establish that his claims have any merit at all.[2]

A. Due Process Claim

Bowling's due process claim has changed somewhat since this lawsuit was filed, but it appears to be based on two theories, none of which has merit.

i.

Bowling appears to claim first that the defendants had a constitutional obligation to inform him of all changes in the law affecting his entitlement to retirement benefits. Prior to 1969, Alabama law provided that if a teacher retired between ages 60 and 65, he would suffer an early retirement benefit penalty. In 1969, however, the legislature amended the law to eliminate the penalty, so that a teacher could retire with full benefits at age 60. Bowling argues that the defendants should have informed him of this change and that, because of their failure, he worked past age 60.

Bowling premises his claim on a state case, Employee's Retirement System v. McKinnon, 349 So.2d 569 (Ala. 1977), which he contends places a fiduciary responsibility on Teachers' Retirement System officials to inform teachers of all changes in state law. Bowling overlooks the obvious fact that his claim is based on federal law, not state law. While state law may place a burden on the defendants, there is nothing in federal law that does. See Grueschow v. Harris, 633 F. 2d 1264 (8th Cir. 1980). In any event, after 1969, the defendants dissiminated [sic]

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2. Indeed, this is an alternative ground for granting summary judgment against Bowling--that is, that his claims simply lack merit.

publications that correctly reflected the law after 1969. That Bowling was not notified of the change does not rise to a constitutional violation.

ii.

Bowling's second due process claim appears to be that the defendants affirmatively misled him to believe that the law before 1969 remained unchanged thereafter. He in essence charges the defendants with the tort of intentional or innocent fraud or misrepresentation. Bowling fails to state a claim under § 1983.

In Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981), the United States Supreme Court held that when a prisoner who was negligently deprived of his property by prison officials had adequate post-deprivation state tort remedies, the prisoner did not have a due process claim under the United States Constitution. The Court extended this holding to intentional deprivations of property by prison officials in Hudson v. Palmer 468 U.S. 517, 104 S.Ct. 3194 (1984). The state post-deprivation remedies were seen as adequate in Parratt because they could have provided full compensation for the loss. Although the state remedies did not provide for punitive damages or trial by jury, both of which might have been available to the prisoner had he been allowed to proceed under § 1983, the Court nonetheless concluded that the state remedies were adequate to satisfy the requirements of due process.

Bowling has adequate remedies to pursue his claims of misrepresentation against the Teachers' Retirement System. He may simply seek review of the denial of his benefits in state court. See Employee's Retirement System v. McKinnon, supra; see also Hall v. Sutton, 755 F2d 786, 787 (11th Cir. 1985) (per curiam) (Alabama provides "an adequate state remedy for this alleged deprivation of property"); 1975 Ala. Code §§ 41-9-60 to 41-9-74.

B. Equal Protection Claim

Recently, in E & T Realty v. Strickland, 830 F.2d 1107 (11th Cir. 1987), our appellate court explained what was necessary to establish an equal protection claim.

> The unlawful administration by state officers of a state statute fair on it face, resulting in unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.

Id., at 1112-13, quoting Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 401 (1984) (emphasis added). Therefore, even if Bowling and certain other teachers were similarly situated, there would be no denial of equal protection absent proof that the defendants acted with discriminatory intent. The appellate court then further explained that intentional discrimination "implies more than intent as awareness of consequences. It implies that the decision maker . . . selected . . . a particular course of action at least in part 'because of' . . . its adverse effects upon an identifiable group." 830 F.2d at 1114, quoting Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279, 99 S.Ct.2282, 2296 (1979).[3] "Thus, for

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3. The reason for this requirement, as explained by the appellate court, is that,

> "A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored." Snowden, 321 U.S. at 11-12, 64 S.Ct. at 403. The requirement of intentional discrimination prevents plaintiffs from boot-strapping all mis-applications of state law into equal protection claims. "Probably no law contrived by man for his own governance ever has had or will be enforced uniformly and without exception. But the Constitution does not demand perfection." Standard Oil Co. v. Boone County Bd. of Supervisors, 562 S.W.2d 83, 84

plaintiffs to prevail, defendants' conduct must have been deliberately based on a unjustifiable, group-based standard." Id., at 1114. (footnote omitted). Bowling has failed to offer any evidence of intentional "unjustifiable, group-based" discrimination.

C. First Amendment Claim

Bowling's final claim is that officials of the Teachers' Retirement System violated his first amendment right to petition the government by denying him retirement benefits he would have received if he had not pursued his litigation to retain his job. Bowling argues that the reason he did not seek retirement benefits at age 60 was because he had a lawsuit against the University of Alabama seeking reinstatement; he explains that if he had sought such benefits his lawsuit would have become moot because he would have "voluntarily" retired. Bowling's argument must fail for several reasons.

First, this court does not believe that, if Bowling had sought retirement benefits in the wake of his discharge from the University of Alabama, his reinstatement lawsuit would have been necessarily mooted. If Bowling had prevailed in his discharge lawsuit, the relief available to him could have still included reinstatement, if his retirement was in fact premised on, or proximately caused by, his illegal discharge. Federal courts undoubtedly have broad authority to fashion whatever relief is necessary to completely redress the wrong. See B. Schlei and P.

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(Ky.1978) (quoting City of Ashland v. Heck's, Inc., 407 S.W. 421, 424 (Ky.1966)). The equal protection clause requires no more than that state dedcisionmakers applying a facially neutral state [statute] not intentionally discriminate.

Grossman, Employment Discrimination Law 2d, pp. 1396-98, and numerous federal cases cited therein.[4]

Second, Bowling has not shown that this "Hobson's choice" scenario is not an after-the-fact fabrication by him. He has presented no evidence whatsoever that he in fact confronted the University of Alabama or the judge in his reinstatement litigation with his problem, and was advised if he accepted retirement benefits he must forego reinstatement. Moreover, and perhaps most significantly, he never confronted the officials of the Teachers' Retirement System with his problem, to see whether they might be willing to afford him benefits in a manner that did note affect his reinstatement litigation. The Teacher' Retirement System was never confronted with his so-called problem, and the System can therefore not be held accountable for Bowling's decision not to seek retirement benefits pending his reinstatement litigation.

An appropriate judgment will be entered.

DONE, this the 11th day of February, 1988.

s/ Myron Thompson
UNITED STATES DISTRICT JUDGE

4. Bowling relies on a state case from Oklahoma to support his argument. This case is not binding on federal courts.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

LAWRENCE E. BOWLING,
Plaintiff
v. CA No. 81-634-N

DAVID G. BRONNER, etc., et al.,
Defendants

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of this court:

(1) That the defendants' May 27, 1987, motion for summary judgment is granted, and that summary judgment is entered in favor of the defendants and against the plaintiff; and

(2) That the plaintiff's May 26, 1987, motion for partial summary judgment is denied.

It is further ORDERED that costs are taxed against the hplaintiff, for which execution may issue.

DONE, this the 11th day of February, 1988.

s/ Myron Thompson
UNITED STATES DISTRICT JUDGE

# IN THE
# SUPREME COURT OF THE UNITED STATES
# OCTOBER TERM, 1989

(2)

**No. 89-545**

LAWRENCE E. BOWLING,

Petitioner,

v.

DAVID G. BRONNER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

William T. Stephens
135 South Union Street
Montgomery, AL 36130
Counsel for Respondents

IN THE
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1989**

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**No. 89-545**

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LAWRENCE E. BOWLING,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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# RESPONDENTS' BRIEF IN OPPOSITION

---

William T. Stephens
135 South Union Street
Montgomery, AL 36130
Counsel for Respondents

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

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No. 89-545

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

# RESPONDENTS' BRIEF IN OPPOSITION

## Opinions Below

The opinions of the United States District Court for the Middle District of Alabama (Thompson, D.J.) were not published but are printed at pages 10-26 of the Appendix to the Petition.

The opinion of the United States Court of Appeals for the Eleventh Circuit was not published but is printed at pages 1-9 of the Appendix to the Petition.

## Jurisdiction

Petitioner seeks to invoke jurisdiction of this Court pursuant to 28 U.S.C. §1254 which provides that the Court may review decisions of the Courts of Appeal.

## The Questions Presented For Review

Respondents do not wish to restate the Questions Presented For Review in the Petition because Respondents are not seeking review of any questions. Respondents, however, note here that the factual premises of the Questions Presented For Review in the Petition are not consistent with the facts of this case as shown by the record.

## Statutes Involved

The statutes involved are §16-25-1, et seq., **Code of Alabama 1975**, and, in particular, §16-25-14, **Code of Alabama 1975**, which is set out at page vii of the Petition, and 42 U.S.C. §1983. Petitioner also asserts claims under the First and Fourteenth Amendments.

## Statement of the Case

Petitioner invoked federal jurisdiction in the District Court pursuant to 42 U.S.C. §§1983, 1985, 1986 and 28 U.S.C. §§1343, 2201 and 2202. Respondents disputed and continue to dispute such jurisdictional basis. The Petitioner is a white male who is not alleging racial discrimination and Respondents are state officials who are not "persons" within the purview of 42 U.S.C. §1983 as this Court recently held in **Will v. Michigan Department of State Police**, 57 L.W. 4677 (June 15, 1989).

The Petitioner is a retired university professor who by this action is seeking both the retroactive payment of state retirement benefits for a period of four years before he retired and punitive damages against the Respondents.

The Respondents are state administrative officers, employees and board members of the Teachers' Retirement System of Alabama, an instrumentality of the state of Alabama and a governmental pension plan created by, and existing pursuant to, §16-25-1, et seq., **Code of Alabama 1975**, for the provision of certain retirement and survivor benefits for public school teachers in the state of Alabama.

Petitioner was employed by the University of Alabama from September 1, 1964 until May 16, 1976 and in such capacity participated in the Teachers' Retirement System from the date of his initial employment.

Petitioner first inquired about retirement qualifications in August, 1972 and was supplied with a handbook, or pamphlet, correctly and fully explaining the age and service qualifications for retirement, the benefits paid and other aspects of the retirement law as they then existed in 1972.

In December, 1979, Petitioner inquired about retiring and in January, 1980, filed formal application for retirement benefits. Upon applying for retirement Petitioner demanded that he be paid retroactive benefits for a period of four years prior to the date of his retirement. He argued that the applicable state statute provided for the payment of benefits from the time that one becomes eligible to retire and not from the time that one does, in fact, retire. Secondly, he informed Teachers' Retirement System officials for the first time that when he first became eligible to retire he had been engaged in litigation in federal court against the University of Alabama over his dismissal and could not apply for retirement because to do so would moot his federal lawsuits. He argued that the denial now of retroactive benefits would violate his First Amendment right to petition the courts.

Petitioner, Dr. Lawrence Bowling, had been dismissed from his position as a Professor at the University of Alabama effective August 13, 1972. At the time of his dismissal he was not eligible for retirement under the state teachers' retirement law since he did not have 10 years of service nor was he sixty years old. On February 9, 1973, he filed the first of several lawsuits against the University and numerous of its employees and officials challenging his dismissal. The District Court found that the faculty committee hearing which recommended his termination was deficient in procedural due process and ordered a rehearing by the University with additional procedural safeguards. See **Bowling v. Mathews**, 511 F.2d 112 (5th Cir. 1975).

The University then initiated a lengthy and elaborate hearing procedure which culminated in a decision to terminate Dr. Bowling's employment effective August 15, 1976. Dr. Bowling's continued employment with the University during this lengthy hearing process enabled him to qualify to retire under the state teachers' retirement law. He became eligible to retire in May of 1976 by virtue of having a minimum of 10 years of creditable service and being 60 years

of age. Dr. Bowling did not, however, retire when he became eligible for retirement.

Following his dismissal in August, 1976 Dr. Bowling filed three more lawsuits and was unsuccessful in each although he continued to pursue his appeals petitioning for review all the way to this Court. See **Lawrence E. Bowling v. Charlie Scott, et al.**; and **Lawrence E. Bowling v. David Mathews, et al.**, 587 F.2d 229 (5th Cir. 1979); reh den 591 F.2d 1343, cert den 100 S.Ct. 69, 444 U.S. 835, 62 L.Ed.2d 45, reh den 100 S.Ct. 471, 444 U.S. 974, 62 L.Ed.2d 390. The complaint in this case alleges that Dr. Bowling's litigation "was finally concluded adversely to him in late 1979; and he decided to retire."

Dr. Bowling also filed a federal lawsuit against the Director of the State Department of Industrial Relations, the Appeals' Referee, the members of the Board of Appeals, the Clerk of the Board of Appeals and the attorneys for the Department of Industrial Relations relating to unemployment benefits. He filed a similar action in state court and sued the same departmental officials and the Board of Trustees of the University of Alabama. **Bowling v. Carter**, CV-78-223, Circuit Court of Tuscaloosa County. The District Court dismissed the federal action for failure to state a claim and the Fifth Circuit upheld that dismissal. See **Bowling v. James N. Carter, et. al.**, Case No. 78-3822 (5th Cir. 1980, Unpublished Opinion).

He filed still another related case in federal court against Dr. Frank Rose, the former president of the University of Alabama. **Bowling v. Rose**, CA-80-7225 (D.C.N.D. Ala.) See also **Bowling v. Pow**, 301 So.2d 55 (Ala. 1974) (defamation action ultimately decided adversely to Bowling), another related case.

When the Retirement Systems administrative officers denied his demand for retroactive benefits, he appealed that denial to the Systems' governing Board of Control, to which he made the same statutory construction and First Amendment arguments, and that Board denied his request for retroactive benefits.

Petitioner then, in November, 1981, filed this suit against the members of the Board of Control of the Teachers' Re-

tirement System and apparently every officer and employee of the Retirement System with whom he had communicated either orally or by written correspondence seeking retroactive retirement benefits and punitive damages.

In addition to asserting his argument concerning the construction of the applicable state statute and his First Amendment right to petition argument, Petitioner, for the first time, asserted the argument that he had not retired when he first became eligible because he had not been informed of the 1969 change in the retirement law. Prior to 1969 the state's retirement law provided for the payment of a reduced benefit for retirement before age 65. In 1969 the state legislature amended the law to provide for full benefits for retirement at age 60 or thereafter with at least 10 years of service. The 1969 handbook, the newsletter, and other items published and distributed by the Teachers' Retirement System in 1969 highlighted this change in benefits. Handbooks and other publications prepared in subsequent years, while correctly explaining the benefits then in effect, have not specifically noted that such benefits differ from those provided before 1969.

The Plaintiff's charges against individual defendants in this case may be summarized as follows:

Petitioner charged that Defendant Jan Orgeron, a statistician and a merit system employee, did not answer his "urgent" letter of December 19, 1979, until January 2, 1980, after the Christmas and New Year's holidays; that Defendant William T. Stephens, legal counsel for the state Teachers' Retirement System and a state assistant attorney general, refused to request an advisory opinion from the State Attorney General; that Defendant David G. Bronner answered only the third of three letters which plaintiff sent to him and that plaintiff sought Dr. Bronner's support for his position but that Dr. Bronner opposed his request for additional benefits before the Board of Control of the Teachers' Retirement System; that defendants Donald L. Yancey and William C. Walsh did not supply plaintiff with all of the information which plaintiff sought when plaintiff sought it; that Defendant Paul R. Hubbert advised Plaintiff to seek the assistance of a member of the Alabama Legislature in obtaining an advisory opinion from the State Attorney Gen-

eral "although Dr. Hubbert knew or reasonably should have known that an advisory opinion issued to a member of the legislature had no binding effect on the Teachers' Retirement System"; and that the other Defendants, members of the Board of Control of the state Teachers' Retirement System, misinterpreted the state teachers' retirement law in ruling that such law did not permit payment of retirement benefits for a period prior to the teachers' submission of a retirement application.

The District Court dismissed the claims asserted under 42 U.S.C. §§ 1985 and 1986 for failure to state claims upon which relief could be granted, and dismissed the claims under 42 U.S.C. § 1983 asserted against the Respondents in their official capacities because of the bar of the Eleventh Amendment. The District Court granted summary judgment as to claims asserted against Respondents in their individual capacities on the basis that the Respondents were entitled to qualified immunity, and that the claims simply lacked merit.

The District Court found that Respondents had not conditioned Petitioner's receipt of retirement benefits upon his relinquishment of his right to petition the courts and suggested that this argument by Petitioner was an "after-the-fact fabrication". The District Court also found that any failure to personally advise Petitioner of the 1969 change in the law when it occurred would not constitute a failure of notice sufficient to be a due process violation where Respondents had subsequently disseminated to him publications that correctly reflected the law after 1969.

On appeal the Court of Appeals affirmed the judgment of the District Court. The Court of Appeals found that both Petitioner's First Amendment claim and his equal protection claims were "factually impossible" and that his due process claims were "untenable", "spurious", "patently unreasonable" and "ridiculously burdensome". The Court of Appeals concluded that there was "no merit" to Petitioner's First Amendment and equal protection claims and, with respect to his due process claim, that "the record amply demonstrates that Bowling received all the process he was due".

## Reasons for Denying the Petition

### I

The decision below turns on the unique facts of this case and is without constitutional or precedential significance.

Petitioner's case, from the early administrative proceedings through the District Court, through the Court of Appeals and now to this Court, has been a kaleidoscope of changing factual allegations and shifting legal theories. Every time one looked it was different.

As noted in the Statement of the Case, the factual support for Petitioner's claims was so lacking that the district court judge suggested that Petitioner's First Amendment claim was an "after-the-fact fabrication" and the judges of the Eleventh Circuit said that both Petitioner's First Amendment and his equal protection claims were "factually impossible", and that his due process claims were "spurious", "untenable", "patently unreasonable" and "ridiculously burdensome".

### II

The factual premises of the Questions Presented for Review by the petition are not the facts of this case as shown by the record.

The factual premise of the first question presented for review in the Petition is that Petitioner did not receive "clear and timely notice of a change in the retirement law entitling him to retire at age 60 with full retirement pension". The record shows that Petitioner was provided with a handbook in 1972, prior to the time that he became eligible to retire, which correctly explained the benefits payable under the law governing the Teachers' Retirement System and, in particular, that Petitioner could retire at age 60 with 10 years of service with a full retirement pension.

The exquisitely devious subtlety in Petitioner's statement of the question is presumably based upon the argument which he made in the courts below that he was not notified of the **change** although he was notified of the **changed benefits**. In other words, he argues that although they

provided me with an up-to-date explanation of the law they did not especially call to my attention that the law was different from what it had been prior to 1969. He asserts, at page 2 of the Petition, that "Although the change was explained in the *TRS Handbook*, 1969, respondents did not supply petitioner a copy of **this edition** of the handbook." (emphasis added) He conveniently does not mention that, prior to the time that he became eligible to retire, he received a copy of a later edition of the TRS handbook which correctly explained eligibility requirements and benefits.

The Court of Appeals deservedly called Petitioner's argument "untenable", "patently unreasonable" and "absurdly burdensome".

The factual premise of the second question presented for review in the Petition is that Respondents withheld Petitioner's pension because he had not relinquished his right to petition the courts for reinstatement. The District Court found no evidence that Respondents' had conditioned the payment of retirement benefits to Petitioner upon his relinquishment of his right to petition the courts but, rather, suggested that this argument by Petitioner was an after-the-fact fabrication. The Court of Appeals found petitioner's assertion to be "factually impossible". The court noted that Respondents did not even know of Petitioner's lawsuits when he became eligible to retire. The record shows that Respondents, most of whom were not even affiliated as officers or employees of the Retirement Systems until years after Petitioner's lawsuits were filed, and after he became eligible to retire, did not know of Petitioner's lawsuits until after he applied for retirement in 1980.

## III

The decision below is consonant with prior decisional law. The cases cited by Petitioner are not applicable in this case and Petitioner has not cited any decision of this Court or of the Courts of Appeals, and none is known to Respondents, with which the decision below would conflict.

The Court of Appeals raised, but pretermitted, the question of whether Petitioner had a constitutionally protected fundamental right to retire under a state-created retirement

plan as soon as he became eligible to do so citing **Karr v. Schmidt**, 460 F.2d 609 (5th Cir.), cert. denied 409 U.S. 989 (1972). Regardless of that issue, both the Court of Appeals and the District Court found that, under the circumstances of this case, Petitioner did not have a right to the individual notice of each change in the state's statutory law to which Petitioner claims to be entitled. This is consistent with the decisions of other Courts of Appeals in **Ornstein v. Regan**, 604 F.2d 212 (2nd Cir. 1979) and **Grueschow v. Harris**, 633 F.2d 1264 (8th Cir. 1980).

The cases cited by Petitioner, **Mullane v. Central Hanover Trust Co.**, 339 U.S. 306, 70 S.Ct. 652 (1950) and **Mennonite Board of Missions v. Adams**, 462 U.S. 803, 103 S.Ct. 2706 (1983), involving vastly different factual situations, one involving a judicial settlement proceeding and the other involving a tax sale, simply stand for the general proposition that a person cannot be deprived of property without due process of law and, under the facts of those cases, a certain type notice and hearing were required to provide due process. Due process is always fact-specific, i.e., the process due is dependent upon the facts of the situation. Even if individual notice of the 1969 statutory change to each person eligible for benefits under the changed law were required by these cases, Petitioner was not eligible for benefits under the changed law in 1969 and did not become eligible until 7 years later by which time he had received personal notice of the changed benefit law. Petitioner was given notice and was given a hearing and the Court of Appeals found that the record amply demonstrates that Petitioner "received all the process he was due".

With respect to the second question presented by this Petition, not only is Petitioner's First Amendment claim factually unsupportable, it is legally invalid and misdirected at these Respondents. His assertion that his filing of an application for retirement benefits would have mooted his federal lawsuit, thus denying him the right to petition the courts, is really an attack upon the federal courts' mootness doctrine. The real thrust of his theory is not that these Defendants conditioned his receipt of retirement benefits upon his foregoing his right to petition the courts but, rather, that the **federal courts** conditioned his right to petition

the courts upon his foregoing his receipt of retirement benefits.

The District Court found that Petitioner's filing of an application for retirement benefits would not have mooted his federal lawsuits challenging his termination on federal constitutional grounds and Petitioner has not presented any applicable judicial precedent to sustain that position. To the contrary, Petitioner's litigation continued after he filed his retirement application and after he began drawing retirement benefits.

## Conclusion

**The petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.**

Respectfully submitted,

William T. Stephens
135 South Union Street
Montgomery, Alabama 36130
Counsel for Respondents

(3)

No. 89-545

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

LAWRENCE E. BOWLING,
Petitioner

v.

DAVID G. BRONNER, etc., et al.,
Respondents

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

## REPLY BRIEF FOR PETITIONER

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TPP

# No. 89-545

# IN THE SUPREME COURT OF THE UNITED STATES

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## REPLY BRIEF FOR PETITIONER

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# REPLY BRIEF FOR PETITIONER

In their Brief in Opposition, instead of attacking the issues, Respondents attack Petitioner. They try to portray him as a man who, after being "dismissed from his position as Professor at the University of Alabama", filed numerous frivolous lawsuits against innocent officials. More than half their Table of Authorities is devoted to said cases, which have no bearing upon the issues of this case, other than the fact that Petitioner could not apply for retirement benefits without mooting his cases against officials of the University of Alabama. But that is not the reason that Respondents listed said cases. They listed them to malign Petitioner.

The two cases against James N. Carter and other officials of the Department of Industrial Relations were the same case, filed simultaneously in federal and state courts. Respondents studiously neglect to state that Bowling won that case in state court. The cases against David Mathews, Frank Rose, and Charlie Scott were the same case. Bowling won part of that case. Not a bad batting average for a pro se layman, considering the fact that the average lawyer loses half his cases.

Respondents devote more than a page of their brief to Petitioner's discharge and his lawsuits but studiously neglect to state that he was discharged (1) because he complained about being solicited by his department chairman for a political contribution and about the over-emphasis on football and the under-emphasis on academics, (2) because he refused to teach a low-level course without being given an order to do so, and because he was tried by a jury composed of the defendants' employees. Respondents also neglect to state that the Board of Trustees of the University of Alabama relieved both Frank Rose and David Mathews of their positions as President. Respondents further neglect to state that McDowell Lee, Secretary of the State Senate and a member of the

Employee's Retirement System, brought suit against Respondent David Bronner, charging that Bronner:

> (a) Without legal authority and for direct personal gain caused State and Retirement System funds to be paid for personal attorney's fees and other charges associated with the defense of the aforementioned cause of action [Meadows v. Bronner, Civil action No. CV 79-397-P];
>
> (f) Received from stock and bond brokerage firms or representatives illegal gifts and payments of hotel and entertainment expenses, including meal, cocktail, and room charges at conventions in Gulf Shores, Alabama, and elsewhere, and received from the same sources illegal payments for air travel to California and other locations;
>
> (g) Caused State of Alabama and State Retirement System monies to be expended for direct personal gain, in the form of attorney's fees and other payments represented in Retirement System documents to be for "consultation with the Board of Control."

*McDowell Lee v. David Bronner*, 404 So.2d 627, 628 (Ala. S.Ct. 1981). The Circuit Court, Montgomery County, dismissed; the Alabama Supreme Court reversed and remanded; and the case was settled out of court.

Respondents also neglect to state that Petitioner had the best publication record in his department, that his scholarly publications had been reprinted in textbooks and published around the world by the U. S. State Department, and that he had been awarded major Fellowships by the American Council Of Learned Societies and the Ford Foundation, as well as major Research Grants from both the University of Alabama and Texas Tech University. These facts are public record. The Court is requested to take judicial notice.

At p. 2, Respondents erroneously contend that they are "state officials who are not 'persons' within the purview of 42 U.S.C. §1983 as this Court recently held in *Will v. Michigan Department of State Police*, 57 L.W. 4677 (June 15, 1989)", 109 S.Ct. 2304. The fact that the

Michigan Department of State Police is an "arm of the state" was never disputed; and the Court stated that "our ruling here . . . applies only to States or governmental entities that are considered 'arms of the state'". 109 S.Ct., at 2311. Both the majority opinion and the two dissenting opinions in *Will* suggest that the Court would find that the Teachers' Retirement System of Alabama is not "an arm of the state" but a corporation created "for the purpose of providing . . . benefits . . . for the teachers of the state of Alabama". Alabama Code §16-25-2. The TRS law, §§16-25-1 et seq., makes clear that TRS is a separate entity from the State, has financial independence, holds property in its own name, has full autonomy and control, and performs no "governmental" function but acts only in a "proprietary" and "fiduciary" capacity and for the benefit only of said teachers, who make contributions to the TRS and who constitute only 3% of the "public" of Alabama. Sec.16-25-2 provides that TRS "shall have the power and privileges of a corporation" and that:

> Any provision of the law to the contrary notwithstanding, the boards of control of the teachers' retirement system of Alabama and the employees' retirement system of Alabama shall have vested in them all powers necessary to fulfill their fiduciary duty to members of each respective system including the power to sue and be sued....

Respondents, in effect, concede one of the issues on which this Petition is based, the failure of Respondents to give Petitioner clear and timely notice of the change in the law allowing members to retire after age 60 without penalty for retirement before age 65. Although they state that "the 1969 handbook, the newsletter, and other items published and distributed by the Teachers' Retirement System in 1969 highlighted this change in benefits", they do not state to whom these materials were "distributed" and do not allege that they ever supplied any of these materials to Petitioner. Moreover, they admit that the "handbooks and other publications prepared in subsequent years while correctly explaining the

benefits then in effect, have not specifically noted that such benefits differed from those provided before 1969." P. 5. Petitioner wrote Respondents in 1972, requesting information about his retirement rights; they posted him a letter and a copy of the 1971 handbook, neither of which mentioned the change in the law or his right to retire without penalty. R3-105-Exhibits A,B,C. Petitioner has sworn that Respondents never at any time informed him of his right to retire at age 60 without penalty. R3-108-11, ¶6.

Respondents' primary argument for denying the Petition is that the lower courts ruled against Petitioner. Three times, they repeat that the district judge found that Petitioner's First Amendment claim was an "after-the-fact fabrication". Pp. 6, 7, 8. Such finding is a flagrant violation of F.R.C.P. 56, which provides that no court may make any finding of fact on a motion for summary judgment:

> "The message is clear; the party who defended against the motion for summary judgment will have the advantage of the court's reading the record in the light most favorable to him, will have his allegations taken as true, and will receive the benefit of the doubt when his assertions conflict with those of the movant." Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d §2616, citing *Bishop v. Wood*, 1976, 426 U.S. 341, 96 S.Ct. 2074, and other cases.

Respondents repeat *ad nauseam* that the appellate court panel ruled against Petitioner. If the appellate panel had not ruled against Petitioner, why else would he petition for a writ?

Most of Respondents' argument consists of mere bald assertions. In their whole brief, there is not one reference to the record, enabling the Court to verify their assertions.

Respondents contend that Petitioner was not entitled to notice of the change in the law eliminating the penalty for retirement before age 65. They

further contend that this right is not mandated by *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950). But the Court has repeatedly held: "When protected interests are implicated, the right to some kind of prior hearing is paramount." *Board of Regents v. Roth*, 404 U.S. 564, 569-570, 92 S.Ct. 2701, 2705 (1972), and cases there cited. Moreover, both the District Court of Montgomery and the Alabama Supreme Court have reprimanded Respondents for their adversary attitude toward their beneficiaries and have admonished them to make special effort to keep their members properly informed of their retirement rights and to help them obtain the maximum benefits provided by law. *Employees' Retirement System v. McKinnon* (actually against the Teachers' Retirement System), 349 So.2d 569, 571, 573-574 (Ala. 1977).

Four years after the *McKinnon* rulings, Petitioner appeared before the Board of Control on June 26, 1981, and requested permission to present argument on Respondents failure to keep him informed of his rights. Chairman Paul R. Hubbert denied the request, and the other Board members acquiesced in his denial, RE 39; R3-108-Bowling's Affidavit, pp. 13-14. All are personally and officially liable.

Petitioner has twice requested the clerk of the U.S. District Court for the Middle District of Alabama to certify the record and transmit it to this Court. Apparently, he has not done so. This Court is requested to request the record.

## CONCLUSION

Respondents' Brief in Opposition states no valid reason for denying the Petition.

Respectfully submitted,

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